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**SUPREME COURT OF THE
UNITED STATES OF AMERICA**

**NO. 77-637
OCTOBER TERM, 1977**

**MICHAEL GEORGE REEVE,
DEREK TREVENNING HARRIS
and ROY DAVID THOMPSON,**

Petitioners

vs.

UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

No......

October Term, 1977

MICHAEL GEORGE REEVE,
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Petitioners

vs.

UNITED STATES,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now the petitioners, Michael George Reeve, Derek Trevenning Harris, and Roy David Thompson, by their attorneys Roger S. Hanson, and Oscar B. Goodman, members of the bar of the United

States Supreme Court, and Barry T. Simon, member of the bar, Supreme Court of California, asking for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, to review that certain published opinion, **United States v. Thompson, et al.**, ...F. 2d 1350 (9th Cir. 1977), a copy of which is herewith attached to this petition for certiorari.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioners submit the following:

(a)

OPINION BELOW

The official report of the judgment herein sought review is **United States v. Thompson**, ...F. 2d 1350 (9th Cir. 1977), dated June 27, 1977. A copy of that opinion is attached as Appendix "A".

A petition for rehearing and suggestion for hearing **en banc** was made and was denied by the same panel of the U.S. 9th Circuit on August 25, 1977. A copy of the Order of Denial is attached as Appendix "B".

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the opinion affirming petitioner's conviction was entered June 27, 1977.

(ii) A rehearing and suggestion for hearing **en banc** was denied by the U.S. 9th Circuit on August 25, 1977.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1254 (d):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (d) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . "

Jurisdiction of this Honorable Court is further invoked because:

(1) The U.S. Court of Appeals for the Ninth Circuit has internal gross inconsistency of authority among panels of that court on the important national question whether the halting of a motor vehicle at gun point and by other vehicles blocking its path of exit constitutes an arrest, for which probable cause to arrest must be demonstrated, or whether the halting of a motor vehicle at gun point and by other vehicles blocking its path of exit constitute a mere temporary detention which may be accomplished on a "founded suspicion."

(2) The U.S. Ninth Circuit Court of Appeals has sanctioned a violation of Rule 12, Fed. R. Crim. P., which took effect on December 1, 1975, and by which appellants' case was governed by affirming a ruling by the trial court that a motion to suppress evidence which was timely filed on December 29, 1975, could be delayed a hearing thereon until after the jury trial had commenced, the jury had heard the case and the jury

had gone out to deliberate; no **good cause** was advanced or demonstrated for delaying said motion and said ruling violated the mandatory language of Fed. R. Crim. P. 12e which provides:

> "A motion made before trial **shall** be determined before trial unless the court, **for good cause**, orders that it be deferred for determination at the trial of the general issue or until after the verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. . . .",

and where a conflict exists in the circuits now as to the mandatory requirements of F. R. Crim. P. 12e.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the stopping of a vehicle by blocking its exit by police vehicles and by the ordering of the occupants outside of the vehicle at gunpoint constitute an **arrest** rather than a **temporary detention**, and thus requiring that probable cause to arrest the occupants be demonstrated by the government rather than a "founded suspicion" for temporary detention, a question of national importance and an issue dividing the United States Court of Appeals for the Ninth Circuit in its various three-judge panels, and dividing the U.S. Circuit Courts in the United States.

2. Whether (a) Federal Rule of Criminal Procedure 12e, i.e.,

> "A motion made before trial **shall** be determined before trial unless the court, **for good cause**, orders

that it be deferred for determination at the trial on the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. . . ''

is **mandatory** in its directive that a motion to suppress evidence timely made before trial cannot be deferred until after the evidence has been concluded and the jury sent out to deliberate, for a ruling thereon, where the court does not first demonstrate that **''good cause'' exists** for deferral of the ruling, and whether (b) appellants were denied intelligent exercise of their right to take the witness stand in their own defense in their jury trial by the trial court refusing and neglecting to hold an evidentiary hearing on their motion to suppress evidence under F. R. Crim. P. 12e **prior to trial**, so that the decision of the appellants whether to testify or not could be intelligently and timely made, and whether (c) this is plain error within the meaning of Rule 52(b) or whether (d) this is Federal Constitutional error under the Sixth Amendment right to call witnesses in one's own defense and have the assistance of counsel for one's defense?

3. Whether conflict in the Federal Circuits requires the grant of certiorari by this Honorable Court in order to resolve this gross conflict of federal authority at the level of the U.S. Courts of Appeals of the various circuits on the two foregoing issues?

4. Whether probable cause existed to search the airplane piloted by petitioner Roy David Thompson.

(d)

UNITED STATES CONSITUTIONAL AMENDMENTS INVOLVED

FOURTH AMENDMENT

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assitance of Counsel for his defence.

(e)

STATEMENT OF THE CASE WI' 'H FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

SUMMARY STATEMENT OF THE CASE

The case presents the recurring and troubling concept of arrest on probable cause to arrest vis-a-vis detention based on ''founded suspicion'' of criminal conduct.

Appellants were driving two vans in the State of Nevada when they were halted by law enforcement.

None of the arresting officers believed that either van then contained contraband when the vans were halted in broad daylight at a gas station in Boulder City, Nevada.

We summarize the factual background without detailed reference to the Reporter's Transcript on Appeal.

In this case, law enforcement officers routinely surveilled a ''dry lake'' in the vicinity of the Arizona-Nevada border because they believed it was used for the landing of aircraft carrying marijuana, which would then discharge that marijuana into land vehicles such as trucks or vans for distribution in the United States.

In this case, the foregoing constituted the sole and singular theory of modus operandi advanced at petitioners' trial by the United States Government.

The evidence indicated that Arizona law enforcement officers observed a van on November 19, 1975, at nighttime in the Red Lake area of Arizona. This was a dry lake and was also often used for camping purposes. They felt its presence there ''suspicious'' and an all-night surveillance was set up.

Nothing happed at all. Indeed, at one time in the evening of the 19th, the van was halted by police who falsely represented to the van's driver that they were ranchers who feared that the van's occupants were ''cattle rustlers.'' Nothing connected with that van indicated marijuana smuggling; in particular, no smell emanated from the vehicle, and law enforcement had every opportunity to then ''detain'', or order the van's occupants outside for questioning or alleged investigative activity.

In particular, all during the night, no aircraft whatsoever were seen to come close to the area, although it was the theory of the law enforcement that an airplane would land and deliver marijuana to the waiting vans. On the following date, November 20, 1975, a ''suspect'' aircraft, piloted by Petitioner Thompson, a Cessna, was seen flying low over the area and was watched and pursued to where it eventually landed, at Sheri's Ranch, located outside Las Vegas. Law enforcement searched that plane and allegedly found a single seed never fully identified as a marijuana seed, together with some particles of marijuana in the passenger compartment. No load of marijuana was discovered in that so-called ''suspect'' plane.

About that time, in broad daylight, near Boulder City, Nevada, local law enforcement decided to halt the two vans, at a gas station, which were under ''suspicion.'' Each officer that participated in the halting of the vehicles that testified at the trial admitted that they had absolutely no belief that the vehicle then contained any contraband.

Officers ordered the occupants at gunpoint from the two vehicles, a white top-brown body Chevrolet van and a red Ford van. Petitioner's codefendant, one Law, was the driver of the Chevrolet and a subsequent search of the van revealed substantial quantities of marijuana. Petitioner Reeve was the driver of the Ford van which contained no marijuana. Police vehicles blocked the exit of the vans from the place where they were stopped.

Evidence presented at trial alleged that the ''suspect'' plane had hovered over the ''suspect'' vehicles while the ''suspect'' vehicles proceeded down a highway.

However, evidence of aircraft-van contact in this case was absolutely void and vacant and absent. No evidence whatsoever showed that the ''suspect'' aircraft and the ''suspect'' vans had ever been in contact, although the sole theory of the government was that the ''suspect'' aircraft was to land and deliver marijuana to the ''suspect'' vans driven by codefendant Law and Petitioner Reeve, respectively.

While the evidence gathered after the arrest of the pilot, Petitioner Roy David Thompson, and the arrest of the drivers of the vans, Codefendant Law and Petitioner Reeve might well support that a conspiracy to smuggle existed among the defendants, the sole issue Petitioners address themselves to was the legality of the stopping of the vans on probable cause to believe that they then contained contraband, and failure of the

U.S. District Judge to hold and determine a pre-trial motion to suppress evidence per F. R. Crim. P. 2e.

Importantly, at the arrest and search of both the airplane and the vans, the arresting officers at each site did not know of the results of the opposite search. Radio contact was then not possible because of mountains blocking that type of communication.

Although timely pre-trial motions were made to suppress the marijuana seized at both the sites of arrest of the aircraft and the vans, the trial court refused to hear such motions, allowed the entire matter to go to trial, and held and denied the motions only **after** the jury had gone out to deliberate.

Appellants were convicted of conspiracy to distribute a controlled substance and possession with intent to distribute a controlled substance, 18 U.S.C. 841(a) (1) and 846.

(f)

ARGUMENT

I

THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT THE BROWN AND WHITE CHEVROLET VAN CONTAINED CONTRABAND AT THE TIME IT WAS STOPPED, THE DRIVER FORCED FROM IT AT GUN POINT, THE EXIT OF THE VAN BLOCKED BY POLICE VEHICLES AND THE VEHICLE SEARCHED WITHIN THE MEANING OF Chambers

v. Maroney, 399 U.S. 42 and Carroll v. United States, 267 U.S. 132, AND THUS THE EVIDENCE SEIZED SHOULD HAVE BEEN SUPPRESSED.

It would appear that the salient and probative elements which must confront review of this major issue in the case at bar are the following:

(a) Law enforcement Officer Willis of the Kingman, Arizona Police Department, noticed several male subjects gathered around some three vans in the dry Red Lake area of Arizona in a camping scenario before dusk on November 19, 1975. This was purportedly "suspicious" and the observer law enforcement officer departed to secure a four-wheel drive vehicle and other equipment.

(b) He returned, and two other Kingman officers, Lent and Chapin, performed surveillance all night, looking for aircraft to land, for it was the theory of law enforcement that an airplane would land and discharge contraband (marijuana) to the waiting vans. No such airplane ever came close all night nor was there ever any contact between any aircraft and the ground vehicles which were under suspicion.

(c) At 10:40 p.m. on the evening of November 19, 1975, the brown and white van was halted; its driver was defendant, Albert David Law; under the guise that they were ranchers, they inquired into Law's business on the situs, and were told that Law was camping; Law was told that the ranchers personal fear of "cattle rustlers" forced them to order him to leave their ranch lands. Importantly, several **minutes** of conversation

through an open window failed to disclose any tell-tale smell of marijuana emanating from the vehicle, and law enforcement and Law departed without a scintilla of suspicion being aroused. During this encounter, Law's brown and white Chevrolet van was forced off the roadway by the "rancher" law enforcement officers.

(d) The next morning found a gold-white Cessna airplane flying and hovering above and about the dry Red Lake, but absolutely no contact existed or ensued between the plane and the red Ford van or the brown and white Chevrolet van.

Eventually that airplane was surveilled to land at a Nevada Brothel, Sherry's Ranch, and its pilot was seen to enter that establishment to avail himself of its facilities; no contact whatsoever was seen ever to have occurred between the plane and the ground vehicles under suspicion.

(e) One Stevens, a supervisor with the State of Nevada Drug Enforcement set up a surveillance across the street from a Mobil Gas Station where Petitioner Reeve and Codefendant Law were seeking help for a bad tail light in the brown and white Chevrolet driven by Law; he unilaterally decided to then prevent the vehicles from leaving the Mobil Gas Station and did so by driving his vehicle across the street and halting the exit of the vans, drawing his gun to force the occupants to emerge from the vehicles.

(f) Shortly thereafter the vans were searched and marijuana was found in the brown and white vehicle driven by Albert David Law.

Under the theory of the law enforcement that the brown and white Chevrolet van was to receive marijuana **from an airplane** landing in the dry Red Lake area, or at least in a similar neighboring dry lake, the prosecution is faced with these salient irrefutable truisms:

(1) At 10:40 p.m. on November 19, 1975, the halting of the Chevrolet Van and discussions with appellant Law evidently left law enforcement with the conclusion that **nothing was contained within the van,** for otherwise we assume that they would have then arrested Law and searched the van. **Chambers v. Maroney,** 399 U.S. 42.

(2) An all night surveillance **revealed absolutely no aircraft-van contact,** for no aircraft ever came close to the area, let alone ever landing. (See Footnote 1.)

Footnote 1: It is evident that the mere otherwise unconnected association of vehicles, or a single vehicle, with another vehicle even if that other vehicle *is* known to be involved in illegal activity, does not elevate to "founded suspicion" or probable cause the right to stop and seize the initial vehicle. *Some* sort of criminal activity must be known about the first vehicle. *United States v. Barragan-Martinez,* 504 F. 2d 1155 (Ninth Cir. 1974) Moreover, the basis for the probable cause must be explained by the evidence produced in Court. (504 F. 2d at 1156.) Moreover, *while* it may be a popular theory of law enforcement that a "dry lake" is a haven for aircraft-ground vehicle exchange of contraband, no explicit trial testimony developed that this was the case and this Court will not take judicial notice of such an alleged *modus operandi.* 504 F. 2d 1155, 1156-1157 (Ninth Cir. 1974).

(3) In the morning at daylight, a certain Cessna airplane was seen hovering about the dry lake from about 8:00 a.m. to about 9:00 a.m., and then was considered under suspicion since it was tailed by a customs airplane; at this time, or circa thereat, the Ford and Chevrolet vans eventually halted were felt to be participating in some sort of maneuver with the airplane, or vice-versa. Eventually the airplane departed to land at the local Las Vegas fly-in house of ill fame, **Sherry's Ranch.**

Hence, no contact ever occurred that would support the transfer of marijuana from the plane to the vans, and therefore **no probable cause existed to support marijuana being then in the vans at the time that they were halted and searched.** They thus were illegally halted and searched within the meaning of **Carroll v. United States,** 267 U.S. 132 and **Chambers v. Maroney,** 399 U.S. 42. See also **United States v. McClain,** 531 F. 2d 431 (Ninth Cir. 1976), **Coolidge v. New Hampshire,** 403 U.S. 443, and **United States v. McCormick,** 402 F. 2d 281 (Ninth Cir. 1974).

We contend that a bona-fide, full-fledged **arrest** occurred when Supervisor Stevens halted the vans at gun point and prevented their leaving; it is clear that neither appellant Reeve nor Law were free to go and had to subject themselves to the custodial atmosphere

of law enforcement. (See Footnote 2.) Clearly, this constitutes an arrest within the meaning of the cases so interpreting this factual gun-drawn, automobile-blockage scenario in the U.S. Ninth Circuit, **United States v. Strickler,** 490 F. 2d 378 (Ninth Cir. 1974). Police vehicles blocked the exit of these van vehicles and hence **probable cause** rather than a "founded suspicion" must govern.

The 9th Circuit held in **Strickler** at 490 F. 2d 378, 380:

> (1) To decide the case at bench, we need prescribe precisely the point at which police action which detains a suspect ceases to be a nonarrest seizure and becomes an arrest; for we simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the "brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information" which was authorized in **Williams.** (407 U.S. at 146, 92 S. Ct. 1921, 32 L. Ed. 2d 610) The restriction of Strickler's "liberty of

Footnote 2: It is clear that this circuit has held that the stopping of a vehicle and a restraint on the freedom of movement constitutes a "restriction of liberty of movement" and hence an *arrest. Henry v. United States,* 361 U.S. 98, 103, 80 S.Ct. 168, 4 L.Ed. 2d 134 (1959). See *United States v. Selby,* 407 F. 2d 241, 242 (Ninth Cir. 1969)

Henry provides that "arrest on *mere suspicion* collides violently with the basic human right of liberty." *U.S. v. Majorau,* 474 F. 2d 766 (Ninth Cir. 1973)

Thus, *Lovato, Lawrence,* and *Stevens* arrested on their suspicion of appellants and not on the belief that the vehicles *then* contained marijuana.

movement'' was complete when he was entered by police and confronted with official orders made at gun point. (See **Henry v. United States** (1959) 361 U.S. 98, 103, 80 S. Ct. 168, 4 L. Ed. 2d 134; **United States v. Selby**, (Ninth Cir. 1969) 407 F. 2d 241, 242; **Jackson v. United States**, (Eighth Cir. 1969) 408 F. 2d 1165, 1168) No significant, new restraint was added when Officer Ripley, a few moments later, handcuffed Strickler and formally pronounced him ''under arrest.'' Thus the arrest was completed before Officer Ripley reached the window of the Cadillac. (Cf. **Rios v. United States** (1960 364 U.S. 253, 80 S. Ct. (43, 4 L. Ed. 2d 1968; **Henry v. United States**, supra; **Plazola v. United States** (Ninth Cir. 1961) 291 F. 2d 56; **Bailey v. United States**, (1967) 128 U.S. App. D.C. 354, 389 F. 2d 305, 307-308).

(2) The constitutionality of the police conduct, therefore, depends upon whether, at the moment the police surrounded Strickler's automobile and leveled a gun at him, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Strickler had committed or was committing a criminal offense. (See **Beck v. Ohio** (1964) 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142; **Henry v. United States**, supra, 361 U.S. at 102, 80 S. Ct. 168, 4 L. Ed. 2d 134).

Thus, it is clear that the **Carroll-Chambers** ''probable cause to believe that the vehicle **then contained contraband**'' must be the hallmark of the evaluation.

We then look to the **admissions** of the arresting officers themselves to see whether **they** believed that the vehicles **then contained** any contraband.

Participating in the arrest were officers **Stevens, Lovato,** and **Lawrence**. Officer **Lawrence** testified as follows from R.T.A. 349, line 8:

Q. ''It had already landed. And what if anything did the airplane contain neither you or Lovato or Stevens knew at that point, did you?

A. Not right at that point; somewhere right along there fairly close, I'm not sure, I don't know exactly.

Q. But not at the time you went through the stop and went through this business at the gas station?

A. No, sir.

Q. So if the airplane had marijuana on it or not you had no knowledge at that particular point in time?

A. No. I just knew it was under control.

Q. And you had no knowledge at the time if the vans had marijuana in them or not?

A. No.''

Officer **Lovato** testified as follows from R.T.A. 648, line 3:

Q. (By Mr. Sutton) You believed the aircraft and the vans were going to meet at some place, and there would be an exchange of a load?

A. That's correct.

Q. And was there anything in your mind that would suggest to you that the vans had anything?

A. No, sir.

Q. Now, when was the decision made to stop the vans at the Mobile gas station?

A. Just prior to their exiting from the gas station, we felt that we should stop the vans at that particular time rather than attempt to stop them enroute.

Officer Stevens testified as follows from R.T.A. 689, line 1:

Q. (By Mr. Wright) "Then what did you do?

A. We had a short conversation.

Q. Who is "we?"

A. Myself and the defendants.

Q. What was this conversation?

A. They asked a normal question, Why they were stopped.

Q. And what did you say?

A. I told them they were **stopped for their** activities the night before, and suspicious incidents, and I specifically referred to the room registration, the phony room registration."

In fact, concrete efforts on the part of trial defense attorney Raymond Sutton to learn exactly what Stevens' state of mind was when he ordered the vehicles to be halted at gun point and by vehicular blockage was effectively thwarted by the government. From R.T.A. 751, line 25, we have:

Q. "Now up to that point, Agent Stevens, what facts did you have in your mind or what knowledge did you have from all agencies or sources that would indicate to you something of a criminal nature was about to occur?

MR. WRIGHT: I'm going to object to this, Your Honor.

THE COURT: What's your objection?

MR. WRIGHT: I don't quite understand, does he want everything in this Agent's mind at that time?

MR. SUTTON: No. What facts, what knowledge, had been imputed to Agent Stevens at that point?

MR. WRIGHT: This would all be hearsay, Your Honor.

MR. SUTTON: That's exactly right, it would be hearsay. But it's his state of mind, Your Honor.

THE COURT: Sustained.

We can only assume that this evidence, if revealed, would be damaging to the government's **probable cause** equation, for it clearly was offered for the **state of mind** exception to the hearsay rule in an effort to show that the **state of mind** of Officer Stevens was not based on concrete facts which would support probable cause to halt the vehicles in an **arrest** and **search**. It should therefore have been allowed into evidence.

It is clear that under **United States v. Strickler**, 490 F. 2d 378 (Ninth Cir. 1974), that this was not a **detention for investigative interrogation** but was, indeed, a **full-fledged premeditated arrest** where the theory of the government was that the vehicle played a certain role in their never-to-occur scenario of aircraft-van interaction. Thus ample time existed to secure a search warrant. **Coolidge v. New Hampshire**,

403 U.S. 443; **United States v. McCormick**, 402 F. 2d 281 (Ninth Cir. 1974); **Halpin v. Superior Court**, 6 Cal 3d 885; see **Cardwell v. Lewis**, 417 U.S. 581, specially noting the dissents.

In fact, Stevens based his decision to halt the vehicles solely on the "suspicious activity" that he had heard of which had occurred "the night before." From R.T.A. 756, line 5-10, we have:

Q. "Okay. So at that point you wanted to stop the vans because of the suspicious activity that you had been informed about by those other agents?

A. Yes.

Q. Dating back to the night before?

A. Yes."

In fact, Stevens did not even know that the people that were in the vans at the Mobil gas station were the same individuals that had been seen at Red Lake the night before. From R.T.A. 759, lines 8-15 we have:

Q. "Well, you had a guesstimate as a police officer but you had no information to verify whether or not the people, the individuals at the Red Lake area, and the people that were at the gas station, were one and the same now, did you?

A. At the time or before I talked to them?

Q. Yes, sir. At the time you stopped them at the gas station?

A. No."

In fact, Stevens gleaned the bulk of his information about the vans and their occupants from what he heard

testified to at their trial; From R.T.A. 761, lines 4-17, we have:

Q. (By Mr. Sutton) Now, you've sat here in Court this entire trial. Was there anything that was discussed with you or information furnished you that you haven't heard testified to in this Court, upon which you believed that there had been suspicious activities?

A. A lot of it.

Q. More than was testified to here in Court?

A. No. I mean, there was a lot of it testified to that I had no knowledge of until I heard it.

Q. You mean you've gained more knowledge since you've been here in Court?

A. Certainly.

Q. Than you had at that time?

A. Certainly.

In fact, Stevens admitted that he merely stopped them because he was "**investigating their activities**". (R.T.A. 763, line 4) He thus clearly had no information that would support probable cause to believe that the vehicles **then contained contraband. Carroll v. United States**, 267 U.S. 132; **Chambers v. Maroney**, 399 U.S. 42, 48, 26 L. Ed. 2d 419, 426, 90 S. Ct. 1975. **Chambers** emphasizes over and over again that to halt and search a vehicle requires "probable cause to believe that the car **contains articles** that the officers are entitled to seize,". . . "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the

automobile which he stops and seizes **has contraband** (Restricted compounds such as marijuana) **therein** which is being illegally transported." **Carroll v. United States**, 267 U.S. 132 at 153-154, 155-156, 69 L. Ed. at 551, 552.

As **Chambers v. Maroney**, 339 U.S. 542, 49, 26 L. Ed. 2d 419, 427, 90 S. Ct. 1975 makes clear:

> "The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:
>
> > "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for the belief that the contents of the automobile offend against the law." (267 U.S. at 158-159, 69 L. Ed. at 554)

Thus, **really whether an** "arrest" occurred (as it did per 490 F. 2d 378) at the instant of halting the vehicle is not quite as important as focusing on the key issue which is whether there was probable cause to believe that the vans **then contained contraband** at the moment that they were halted. From the testimony of **Stevens, Lovato**, and **Lawrence**, it is abundantly clear **that all three arresting officers had** no such knowledge and, indeed, under their theory that the hovering airplane was to deliver the contraband, (and it manifestly did not because it was constantly surveilled by air until its landing at Sherry's Ranch) it is quite clear that the **vans did not then contain** the marijuana of large quantity believed to be eventually forthcoming

from the plane if only the requisite contact would have occurred.

We feel it is abundantly clear that no probable cause to search the vans was demonstrated, and no probable cause to arrest was demonstrated at the critical time of the halting of the vans at gunpoint with concomitant blocking of their exit by police vehicle at the Boulder City, Nevada, Mobil gas station. Thus, the marijuana seized should have been suppressed and a directed verdict of acquittal entered.

Indeed, the United States Ninth Circuit in a later case, **United States v. Ramos-Zaragosa**, 516 F. 2d 1041, 144 (9th Cir. 1975) stated, in distinguishing the vehicle halt and arrest with probable cause to arrest and/or search the vehicle from the **subsequently developed** probable cause which **subsequently developed after** a stop for brief investigatory detention,

> "Although we hold that the heroin should have been suppressed (Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); United States v. Strickler, 490 F.2d 378 (9th Cir. 1974); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) and evidence seized on the basis of probable cause which developed concurrently with a reasonably brief investigatory stop pursuant to the authority of Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) is a difficult one to draw and follow. Compare United States v. Bugarin-Cases, 484 F.2d 853 (9th Cir. 1974) with United States v. Strickler, supra. In any event, an extensive review of the authorities will serve no purpose here. Our position

can be stated simply. In this case there was an arrest which was not based on probable cause. The arrest was completed with the appellant and his passenger complied with the order to get out of the pickup. The encounter of the agents and the appellant and his passenger was an arrest, as opposed to an investigatory stop, because the agents at gun point, under circumstances not suggesting fears for their personal safety, ordered the appellant and his passenger to stop and put up their hands.''

In **United States v. Bugarin-Cases**, 484 F. 2d 2853 (9th Cir. 1973), the distinguishing point is well taken and is well illustrated; the vehicle was halted on a ''founded suspicion that because it ''rode low'' in the rear, and because it had a compartment in which aliens might be concealed, it might then have an alien concealed in it. When officers approached it, they saw several packages via a floor board crack due to displaced floor board panels. Because of the officers extensive experience with ''kilo packages'' of marijuana, an arrest was **then** effected based on the **then** developed probable cause. But it is clear that the initial halting was an ''investigatory stop'' and not an arrest as made clear in this circuit by Strickler, supra, and **Ramos-Zaragosa, supra. (See Footnote 3.)**

Footnote 3: In *United States v. Larkin*, 510 F. 2d 13, 14 (9th Cir. 1974) this Circuit per Judges Hufstedler and Choy again affirmed **that:**

''. . . a confrontation with a vehicular blockage and drawn weapons cannot be equated with an investigative detention. (United States v. Strickler, 9th Cir. 1974) 490 F. 2d 378).''

In *United States v. See*, 505 F. 2d 845, 855 (9th Cir. 1974) it was emphasized that anyone not ''free to leave'' from an apprehension situation was faced with an ''arrest that was complete'' *Henry v. United States*, 361 U.S. 98.

Bulgarin-Casas also points up the ''modus operandi'' of alien smuggling may support the ''founded suspicion'' to halt the cars. Contrast, however, the case at bar, where the theory of the prosecution that aircraft-ground vehicle marijuana transfer was the modus operandi of the scheme: That plan was known by the police involved to not have occurred because of their extensive surveillance of the plane and vehicles and because of the halting on the previous evening of the van and a conclusion that the van was then ''clean'', i.e., free of marijuana. Naturally, if it was perceived that the van was not clean we assume it would **then** have been searched and Defendant Law **then** arrested after his extensive interrogation to see if he was ''rustling cattle''.

In short, no ''founded suspicion'' could exist under the theory of the police officers, and it is on that theory of modus operandi that they must now be judged to see if any ''founded suspicion'' could exist. In fact, since a full-fledged arrest occurred, the sole criteria is of course, **probable cause** to believe the vehicle **then contained contraband.** As we have pointed out via the testimony of the officers themselves, this state of mind did not exist and **not a single officer believed** at the time of arrest that the vehicle **then** contained any contraband. Under **Carroll, supra, and Chambers v. Maroney**, 399 U.S. 42, supra, **that** query is the deciding benchmark.

Indeed, officer Stevens (R.T.A. 689) admitted that his sole information came from what another officer had relayed to him about "activities" of the previous night. This can not be sufficient in the absence of **probable cause** possessed by the initiating officer, who plainly had even less probable cause than did officer Stevens, who was to admit that the bulk of his knowledge of the case came from his listening to the other witnesses testify in Court!!!! See also, **United States v. Robinson**, 536 F. 2d 1298, per J. Hufstedler and J. Choy.

While a known type of **modus operandi** may support an arrest where all elements of the **modus operandi** appear to be present (e.g., see **United States v. Bates**, 533 F. 2d 466, 469: car was sighted twice at a warehouse), there the smuggling modus operandi was someone leaving it at the warehouse at the border and a vehicle arriving later to pick it up and take it further north into the interior of the United States; the elements of the modus operandi were apparently complete when the car arrived late at night at the warehouse.

It must follow that where the suspected modus operandi is aircraft supplying marijuana to land vehicles, one can hardly believe and allege that probable cause to believe that the land vehicle contains marijuana at the time of search is created by the known absence and hiatus of failure of the plane and the land vehicle to make contact!!!! That hiatus is what occurred in the instant case, and it is surely that hiatus which

makes fatal any alleged probable cause under the modus operandi theory advanced by the government in the instant case now before the Court.

Moreover, it is apparent that an arrest can take place under federal law without articulation of formal words to the arrestee; actions often speak louder than words.

No formal words are required nor is a declaration necessary at the time of arrest." **Moran v. United States**, 404 F. 2d 663, 666 (10th Cir. 1968); **United States v. Baxter**, 361 F. 2d 116 (6th Cir. 1966); **United States v. Johnson**, 495 F. 2d 378, 381 (4th Cir. 1974).

Certiorari must be granted.

II

THE COURT ERRED IN FAILING TO GRANT A PRETRIAL EVIDENTIARY HEARING ON APPELLANT'S MOTION TO SUPPRESS

United States v. Whitted, 454 F.2d 642 (9th Cir. 1972) presented a case dealing with a District Court's power to reverse its prior ruling on a motion to dismiss an indictment for grand jury prejudice. In holding that the District Court did not have that power, the Court of Appels examined Fed. Rules of Criminal Procedure 12(b) and noted that it "**requires the District Court to determine the motion before trial unless special circumstances exist.**" **Whitted, supra** at 644. The court found **United States v. Dooling,** 406 F.2d 192 (2d Cir., 1969) cert. den sub. nom. **Persico v. United States,** 395 U.S. 911 (1969) to be persuasive.

In **Dooling,** the Court of Appeals issued a writ of mandamus directing the sentencing of defendants and held that a district court judge does not have the power to dismiss an indictment after the return of a

verdict of guilty upon grounds which were in part considered and rejected without leave to renew before trial by another district judge. Defendants made a timely motion under Fed R. Crim. P. 12(b) (2). The disposition of the motions was governed by Rule 12(b) (4). In analyzing the provisions of this rule the court stated that:

> The evident purpose of these two provisions of Rule 12(b) is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution. Obviously this practice is greatly preferable to considering such a motion only after the completion of a lengthy trial. But Rule 12(b) (4) recognizes that occasionally a decision must be postponed until trial, since the merits of the motion may depend on facts which will not be developed until witnesses are called and evidence is introduced. **Dooling, supra,** at 197.

The practice prior to the 1974 Amendments to Rule 12 indicates that, due to the policy considerations of judicial and prosecutorial exonomy, motions under Rule 12 were required to be heard and determined prior to trial absent some special circumstances.

The interaction between Rules 12 and 41, both as amended, was discussed in **United States v. Mauro,** 507 F.2d 802 (2d Cir. 1974) a case involving defendant's untimely suppression motion.

Prior to 1972, Rule 41(e) governed motions for return of property and for suppression and provided that the motions must be made prior to hearing or trial

unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion but the court had discretion to entertain the motion at the trial or the hearing. The requirement of timely motions served several purposes which are applicable considerations in the case at bar:

> Prompt objection to evidence which may have been illegally seized serves other objectives as well. A motion in advance of trial avoids the serious personal inconvenience to jurors and witnesses which would result from interruptions and delay once the jury had been selected and the trial had commenced. United States v. Bennett, 409 F.2d 888, 901 (2d Cir.) rehearing denied, 396 U.S. 852, 90 S.Ct. 113, 24 L. Ed. 2d 101 (1969). Cf. United States v. Allied Stevedoring Corp., 241 F. 2d 925, 931 (2d Cir. 1957) (L. Hand J.) The more telling argument is that the waste of prosecutorial and judicial resources occasioned by preparation for a trial could be avoided if a timely and successful motion were made in advance. United States v. Salli, 115 F. 2d 292, 293, (2d Cir. 1940). In addition, we cannot ignore the right of immediate appeal provided to the Government by the Omnibus Crime Control Act of 1968, as amended, 18 U.S.C.A. §3731 (Supp. 1974) (appeal from pre-trial grant of motion to suppress; **see also** 18 U.S.C. §2518(10)(b) (wiretap evidence). This right would be rendered meaningless if a request for suppression could be postponed until mid-trial, when the only alternative to abandonment of the prosecution would be completion of a fruitless and sometimes lengthy trial in the hope of an ultimately successful post-trial appeal from the granting of the suppression motion.
> **Mauro, supra** at 806

In 1972 present Rule 41(f) was adopted and it provided that suppression motions were to be made as provided in Rule 12. In considering the inconsistencies with regard to the timeliness aspect of Rules 12 and 41 the court commented that "the apparent ellipsis is due to the piecemeal adoption of rule changes rather than to any conscious purpose on the part of Congress or the rulemakers." **Mauro, supra** at 806

Prior to the 1974 amendments to Rule 12 the applicable provision with regard to a hearing on the motion was Rule 12(b) (4)

> **Fed. R. Crim. P. 12**
> ***
> (4) **Hearing on Motion.** A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

In 1974 (effective Date December 1, 1975) Rules 12(c) and (e) were added and became the relevant sections with regard to presentation, hearing and determination of motions to suppress:

> **Fed. R. Crim. P. 12**
> ***
> (c) Motion Date. Unless otherwise provided by local rule, the court may at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

***

(e) Ruling on motion — A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

The Advisory Committee Notes to the amendments indicate that they were designed to make possible and to encourage the making of motions prior to trial whenever possible, and in a single hearing rather than in a series of hearings. The reference to issues which must be tried by the jury in subdivision (e) was deleted as unnecessary without any intention of changing current law or practice. The considerations stated in **United States v. Maury, supra,** at 806 appear relevant at this point. Motions presented and heard in advance of trial prevent the likelihood of interruptions at the time of trial as well the waste of prosecutorial and judicial resources occasioned by preparation for a trial which could be avoided if a timely and successful motion were made and heard in advance. In **Mauro** concern was expressed concerning the possible prejudice to the government's right of immediate appeal. Similar concern was apparently present in Congress since Rule 12(e) was written to provide that determination of the motion was not permissible if a party's right to appeal was adversely affected. The

policy consideration in the orderly, unprejudicial administration of justice dictate that pretrial motions of this character be made, heard, and, in many instances, determined prior to trial.

In **Solomon v. United States,** 408 F. 2d 1306 (D.C. Cir., 1969) pretrial suppression hearings were dealt with in the context of raising a **Wade** objection. Since that case dealt with an objection of constitutional dimension, it is analogous to the case at bar where another constitutional objection (Fourth Amendment rights violation) is raised. In **Solomon**, the Court of Appeals observed that:

> The proper way to raise a **Wade** objection is by a motion to suppress identification testimony before trial. That procedure allows a suppression hearing and a decision on the disputed evidence before a jury is empaneled, and promotes an orderly and uninterrupted trial. A distinctly second-best procedure is a defense motion to suppress during trial. That procedure at least allows decision of the constitutional issue before fatally prejudicial testimony comes before the jury.
> **Solomon, supra** at 1309

This analysis requires determination of the motion in order to prevent fatally prejudicial testimony to come before the trier of fact. In the case at bar the court refused to take evidence on the motion suppress until the prosecution had rested its case. If a pretrial hearing is not required the door is open for fatally prejudicial testimony to come before the trier of fact, the

possibility that a denial of defendant's right of confrontation will occur, and as well, the probability that the court's determination of the motion will be colored by objectionable evidence elicited at trial.

In another case dealing with an issue of constitutional dimension the court required a pretrial hearing. In **United States v. Smith,** 495 F. 2d 668 (10th Cir., 1974) the Court of Appeals, in dealing with defendant's assertion of standing to challenge a Fourth Amendment violation, concluded that:

> The Fourth Amendment rights on which defendant relies are personal rights which may not be asserted vicariously. Ibid. at 230, 93 S. Ct. 1565. The reservation in Brown of the "automatic" standing question means to us that one who attacks a search must assert and establish a personal right protected by the Fourth Amendment and that when such an assertion is contested, "**a full hearing on standing,**" Ibid. at 229, 93 S. Ct. 1565, must be held.

In the instant case, there was no hearing on the motion to suppress. When it was renewed at trial, the court impatiently denied the government request to call a witness, ordered defense counsel to "tell me how they got the evidence," ignored the prosecution statement of disagreement with the defense, and then denied the motion without bothering to say anything about standing. The result was that the defendant had no opportunity to challenge the search and seizure in a proceeding independent of the trial to determine guilt. The statements of counsel are no substitute for a hearing. They showed a factual dispute. Such a

> dispute is determined on the receipt and consideration of evidence, not comments of counsel.
> **Smith, supra** at 670

After reversal, remand and retrial Smith again appealed and the case was discussed in **United States v. Smith**, 527 F. 2d 692 (10th Cir., 1975). In outlining the case procedurally, the court interpreted Rule 12(e) to require a pretrial hearing on a motion to suppress.

> Pursuant to Fed. R. Crim. P. 41 Smith filed prior to trial a motion to suppress the use at trial of the money orders which formed the basis for the prosecution. **The motion to suppress was not heard prior to trial as provided for by Rule 12[e]** and at the trial the money orders in question were received into evidence over objection. Smith was convicted and on appeal his conviction was reversed. **See United States v. Smith**, 495 F. 2d 668 (10th Cir. 1974).
> **Smith, supra** at 693. (Emphasis added)

In the present case, Judge Foley deferred Appellant's timely made motion to suppress until trial (R. p. 182) The Court initially refused to even permit the defense to call witnesses in support of the motion (T. p. 714-815) but later rescinded (T. p. 817) and decided to hear the motion and rule on it while the jury was deliberating (T. p. 820).

Petitioners were neither asked to nor did they stipulate to this procedure, nor did Petitioners stipulate that the evidence presented at the trial by the Government be considered in ruling on the motion to suppress.

The Petitioners throughout the trial objected to the introduction of evidence on Fourth Amendment grounds. Furthermore, during cross examination of witness at the trial, the defense was restricted in its examination of issues which would have been relevant during the motion to suppress. (See Footnote 4.) This latter occurrence reveals the 6th Amendment confrontation deprivations caused by this procedure.

In the cases decided prior to the amendments to the Federal Rules of Criminal Procedure it is indicated that a determination of a motion to suppress, and by implication a hearing on a motion to suppress, was required before trial **unless special circumstances existed**. The Court found no such special circumstances in this record..

Due to the piecemeal Congressional approach to amendment of the rules, legislative intent should be

Footnote 4: See e.g. T.p. 751-752

Q. Now, up to that point, Agent Stevens, what facts did you have in your mind or what knowledge did you have from all agencies or sources that would indicate to you something of a criminal nature was about to occur?

MR. WRITE: I'm going to object to this, Your Honor.

THE COURT: What's your objection?

MR. WRIGHT: I don't quite understand, does he want everything in this Agent's mind at that time?

MR. SUTTON: No. What facts, what knowledge, had been imputed to Agent Stevens at that point?

MR. WRIGHT: This would all be hearsay, Your Honor.

MR. SUTTON: That's exactly right, it would be hearsay. But it's his state of mind, Your Honor.

THE COURT: Sustained.

determined and examined with great weight in an application of the rules to the cases. Considerations of judicial and prosecutorial economy with due regard for the possibility of prejudicing a party's rights should influence any interpretation of the Rules, especially Rules 41 and 12.

Additionally, in cases dealing with the application of the rules to issues of Constitutional dimension, greater weight should be given to policy considerations, particularly where there is the possibility of fatally prejudicing a party's case.

In a suppression motion, as in the case at bar, policy considerations practice under the former rules, and from language in the rules themselves, as interpreted by **United States v. Smith, supra**, it may be concluded that a pretrial presentation and hearing and determination of the motion is mandated. The judge in the present case therefore erred in failing to grant a pretrial suppression hearing. Indeed, the transcript reveals several commends by the Court that he had already made up his mind about refusing to suppress even before he had heard defense evidence. Such surely can not be the hall mark of an unbiased Federal Judiciary in a serious criminal case. But far more serious from a constitutional viewpoint is the uncertainty left in the mind of the defendant whether the defendant should take the stand in his own behalf during the case in chief. If the defendant feels optimistic over the outcome of the suppression motion,

he may, as here, waive his right to testify. But we assert that he should not be put to that uncertain decision due to the refusal of the trial court to hear and adjudicate the timely filed pre-trial motion to suppress evidence before the defense is required to put on their case.

Moreover, a criminal defendant is entitled to the same presumption of a neutral judge who makes no decision on the evidence until he hears **all** of the evidence that this same judge repetitively admonishes the jury during trial — that they are to not make up their mind on the evidence until they have heard that evidence as offered from **both** sides. The instant District Judge, prior to hearing **any** defense evidence, which he illegally deferred hearing until the jury had been sent to deliberate, announced to counsel that he had already made up his mind.

Certiorari should be granted.

III

PROBABLE CAUSE DID NOT EXIST AT THE TIME OF THE ARREST AND SEARCH, THUS INVALIDATING THE SEARCH AND SEIZURE OF THE AIRCRAFT.

The District Court, at the conclusion of the evidentiary hearing on the motion to suppress, orally denied the motion. The District Court made no findings of fact in support of its order denying the motion, except the oral statement that:

> "I do find here that there was consent given, twice given: once to Souza and once to Franger to search the aircraft.
> "But the principal ground I rely upon in denying the motion to suppress is that there was probable cause to seize and search the aircraft."
> (Tr. 1185-86)

Therefore, this Court, like the Supreme Court in **Beck v. Ohio**, 379 U.S. 89 (1964), should make its own study (with the help of guidance of the Petitioner's respectful suggestions) to conclude that the arrest of THOMPSON and the search of the aircraft "cannot on the record before us be squared with the demands of the Fourth . . . Amendment."

It is clear that in the absence of a warrant or voluntary consent, the constitutional validity of the search must depend upon the constitutional validity of THOMPSON's arrest. Whether that arrest was constitutionally valid depends on turn upon whether at the moment the arrest was made, the officers had

probable cause to make it — "whether at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [THOMPSON] had committed or was committing an offense." **Beck v. Ohio, supra,** 85 S.Ct. at 225.

Under the "reasonable expectancy of privacy" doctrine of **Katz v. United States,** 389 U.S. 347 (1967), the external visual perusal of the plane, which preceded the actual physical entries by Souza and later Chapin and Franger, constituted the beginning of the search, which culminated with the ultimate seizure of the seed. Certainly, no one could seriously take issue that THOMPSON's status at the time of the actual seizure was that of being anything other than under arrest.

Notwithstanding the relative mobility of the aircraft, it is submitted that probable cause is a condition precedent even as to it, as the minimum requirement for a lawful search. **United States v. Ortiz,** 422 U.S. 891, 896 (1975); **Almeida-Sanchez v. United States,** 413 U.S. 266, 269 (1973). **Chambers v. Maroney,** 399 U.S. 42.

The record reveals that at the time Petitioner THOMPSON was placed in the custody of the Customs agents, those agents were aware of only the following specific articulable facts, together with rational inferences from those facts, that reasonably warranted suspicion that the aircraft was being used in an unlawful enterprise. **United States v. Portillo-Reyes,** 529 F. 2d 844 (9th Cir. 1975):

On November 19, 1975, when an officer of the Kingman, Arizona Police Department was on patrol in the Red Lake, Arizona, area looking for narcotic smugglers (Tr. 88, 89, 98), the Officer observed three vehicles in the Red Lake area which he felt were suspicious. He then left the area and went to the Sheriff's office, where he picked up a radio-equipped vehicle and, at that time, notified his Sergeant of the suspicious activity he had seen in the Red Lake area (Tr. 101-103). Mojave County Sheriff's Officers responded to the officer's message and went to the Red Lake area (Tr. 122, 202, 262). The officers, one of whom was the aforementioned Officer Chapin, were in the Red Lake area from the evening of November 19, 1975, through the morning of November 20, 1975. The officers observed a red van and a brown and white van in the Red Lake area (Tr. 127, 130, 133, 134, 207, 209). One officer had a conversation with the driver of the brown and white van, who he identified as THOMPSON's co-defendant, Law (Tr. 133).

The officer also identified THOMPSON's co-defendant, Petitioner Reeve as the driver of the red van he had observed in the Red Lake area (Tr. 136). During the night, Officer Chapin forced a brown and white van off the road and identified Law as the driver of the van (Tr. 209, 210).

In the early morning of November 20, 1975, the officers both observed a twin engine aircraft, gold-white in color, fly around the Red Lake area for

approximately forty-five minutes to an hour (Tr. 142, 214). The officers were in radio communication with other officers and, after observing the aircraft until it went out of sight, one officer proceeded to head toward Boulder Dam and Boulder City, Nevada. Enroute, that officer observed a Government Customs aircraft heading north toward Hoover Dam. Next, the officer observed both vans parked at a motel in Boulder City, Nevada (Tr. 146). The officer then received instructions to drive toward Searchlight, Nevada, to check on contact between the suspect aircraft and the vans (Tr. 147). He next received instructions to proceed north and next saw a suspect aircraft at Sheri's Ranch (Tr. 153). Officer Chapin also proceeded from the Red Lake area into Boulder City, Nevada, and met in Boulder City with other officers. Officer Chapin then proceeded in the direction of Searchlight, Nevada, in search of the suspect aircraft and when the suspect aircraft was reported to be heading north, Chapin proceeded to Sheri's Ranch, where the suspect aircraft landed (Tr. 215-18).

Customs Agent and Pilot Hjerbe, piloting a Customs aircraft, followed the suspect aircraft, which he identified as a Cessna, from the Red Lake area to Boulder Dam to Searchlight and then to Sheri's Ranch (Tr. 583). Customs agent Hjerbe was also in radio contact with United States Customs Air Support Officer Souza, who also flew into the Red Lake area at or about the time the twin engine aircraft was circling Red Lake

(Tr. 590-591). The aircraft in which Souza was a passenger also flew toward Boulder City, then Searchlight and finally to Sheri's Ranch where it landed (Tr. 592).

At no time in question did the subject aircraft land in Red Lake. Nor, at any time in question was there contact made between the airplane and THOMPSON'S purported ground-confederates.

Pursuant to this factual setting there was no way the Government agents could rationally infer there was any connection between the aircraft and THOMPSON with an illegal "smuggling operation". An analysis of all the facts, circumstances and lawful rational inference therefrom within the knowledge of the agents at the moment of THOMPSON'S arrest in the field outside of Sheri's, mandate the conclusion that none of the agents had probable cause to make the arrest, therefore vitiating the fruits of the criticized search.

Certiorari should be granted.

CONCLUSIONS

(1) Because of the need to thoroughly and scholarly define the differences in the concept of "arrest" vs. "temporary detention" where a vehicle's exit is blocked by law enforcement and the occupants ordered from the vehicle at gun point, and because of the clear conflict of authority in this area in the Circuits, certiorari should be granted;

(2) Because of the conflict of authority existing in the U.S. Circuit Courts in the interpretation of the December 1, 1974, revision to F. R. Crim. P. 12, now 12e, concerning the time of holding pre-trial motions to suppress evidence, certiorari should be granted.

DATED: September 12, 1977, at Santa Ana, California.

Respectfully submitted,

ROGER S. HANSON
OSCAR B. GOODMAN and
Members of the Bar, U.S.
Supreme Court,

and

BARRY T. SIMON,
Member of the Bar, Supreme
Court of California,

Attorneys for Petitioners,
Michael Reeve, Derek T. Harris,
and Roy Thompson.

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,
v.
Roy David THOMPSON, aka, Larry Gene Madden, Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Michael George REEVE and Albert David Law, Jr.,
Defendants-Appellants.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Derek Trevenning HARRIS,
Defendant-Appellant.
Nos. 76-1821, 76-2041 and 76-2605.
United States Court of Appeals,
Ninth Circuit.
June 27, 1977.

Appeal from the United States District Court for the District of Nevada.

Before CHAMBERS and CHOY, Circuit Judges, and PECKHAM,* District Judge.

CHOY, Circuit Judge:

*Honorable Robert F. Peckham, United States District Judge, for the Northern District of California, sitting by designation.

Appellants contest their jury conviction under 21 U.S.C. §§841(a)(1) & 846 for conspiracy to distribute marijuana. Reeve, Harris, and Law argue that the search of their vans which uncovered 720 pounds of marijuana was improper. Thompson claims that his airplane was searched without his consent and without probable cause. Reeve, Harris, and Thompson also contend that the trial court committed reversible error in postponing the hearing on their motions to suppress until after the jury had begun deliberations. We affirm.

This case arises out of an all-night surveillance effort by federal and state authorities, covering the movement of two vans and an airplane in the contiguous desert areas of Arizona and Nevada. The following morning, the authorities stopped the two vans for the purpose of questioning the occupants. The district court ruled that there was "founded suspicion" to justify this investigatory stop, and appellants do not seriously challenge that determination here. They do argue, however, that the stop ripened into a full-fledged arrest when an officer drew his weapon; that, though the officers may have had sufficient "founded suspicion" to justify the stop, they had no probable cause to arrest; and that, since the arrest was invalid, the fruit of the subsequent search of the vans was inadmissible under **Wong Sun v. United States**, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). This argument is without merit.

[1,2] A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest. **United States v. Richards**, 500 F.2d 1025, 1028-29 (9th Cir. 1974), **cert. denied**, 420 U.S. 924, 95 S.Ct. 1118, 43 L.Ed.2d 393 (1975). **See United States v. Coades**, 549 F.2d 1303, at 1305 (9th Cir. 1977); **United States v. Russell**, 540 F.2d 839, 841 (9th Cir. 1976) (Wright, J., concurring). In the instant case, a weapon was not drawn until, after the officers had identified themselves and ordered the vans to stop, one van began to move and then suddenly lurched forward. **United States v. Ramos, Zaragosa**, 516 F.2d 141, 144 (9th Cir. 1975), **United States v. Larkin**, 510 F.2d 13, 14 n.1 (9th Cir. 1974), and **United States v. Strickler**, 490 F.2d 378, 380 (9th Cir. 1974), relied upon by appellants, did not involve investigatory stops that were properly initiated through unarmed requests to stop and answer questions and, therefore, are clearly distinguishable. **See generally United States v. Nevitt**, 409 F.Supp. 1075, 1078-79 n. 10 (W.D.Mich.1976); **United States v. Diggs**, 173 U.S.App.D.C. 95, 522 F.2d 1310, 1326-27 n. 5 (1975) (Justice, D.J., dissenting).

[3,4] After a brief period during which appellants were questioned, the officers detected a strong odor of marijuana coming from one of the vans. We have repeatedly held that, "(i)f after a valid investigatory

stop probable cause arises, the search may then be made," **United States v. Bugarin-Casas**, 484 F.2d 853, 853 (9th Cir. 1973), **cert. denied**, 414 U.S. 1136, 94 S.Ct. 881, 38 l.Ed.2d 762 (1974). **See e.g., United States v. Russell**, 546 F.2d 839, 840 (9th Cir. 1976) **United States v. Bates**, 533 F.2d 466, 468-69 (9th Cir. 1976); **United States v. Portillo-Reyes**, 529 F.2d 844, 850 (9th Cir. 1975), **cert. denied**, 429 U.S. 899, 97 S.Ct. 267, 50 L.Ed.2d 185 (1976); **United States v. Rocha-Lopez**, 527 F.2d 476, 478-79 (9th Cir. 1975), **cert. denied**, 425 U.S. 977, 96 S.Ct. 2181, 48 L.Ed.2d 802 (1976); **United States v. Moreno-Buelna**, 524 F.2d 1129, 1132 (9th Cir.) (Chambers J., concurring), **cert. denied**, 423 U.S. 1035, 96 S.Ct. 570, 46 L.Ed.2d 410 (1975); **United States v. Rodriquez-Alvardo**, 510 F.2d 1063, 1064 (9th Cir. 1975). And the detection of marijuana odor emanating from a vehicle has been held sufficient in such situations to give rise to probable cause to search. **See Russell, supra** at 840; **United States v. Laird**, 511 F.2d 1039, 1040 (9th Cir. 1975); **United States v. Ojeda-Rodriquez**, 502 F.2d 560, 561 (9th Cir. 1974), **cert. denied**, 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed.2d 839 (1975); **Fernandez v. United States**, 321 F.2d 283, 286-87 (9th Cir. 1963). (See Footnote 1.) Appellants were placed under arrest only after the marijuana was discovered.

1. The district court also found that the officers had probable cause to search the vans even before the investigatory stop and the detection of marijuana odor. Given our disposition of the issues, we have no need to review that finding.

[5] Next, Thompson, the pilot of the plane, challenges the trial court's findings both that he had consented to the search of the plane and that, in any event, there was probable cause to search it after the officers on the scene were informed that the vans had been seized in another location and were found to contain the marijuana. Having reviewed the record, we cannot say that these findings were clearly erroneous. **See United States v. Hart**, 546 F.2d 798, 801-02 (9th Cir. 1976) (en banc), **cert. denied, sub nom. Robles v. United States**, —— U.S. ——, 97 S.Ct. 1155, 51 L.Ed.2d 571 (1977); **United States v. Fong**, 529 F.2d 55, 58 (9th Cir. 1975); **United States v. Agosto**, 502 F.2d 612, 614 (9th Cir. 1974); **United States v. Page**, 302 F.2d 81, 85 (9th Cir. 1962) (en banc); **United States v. Patterson**, 492 F.2d 995, 996 (9th Cir.), **cert. denied**, 419 U.S. 846, 95 S.Ct. 82, 42 L.Ed.2d 75 (1974); **Costello v. United States**, 324 F.2d 260, 261 (9th Cir. 1963), **cert. denied**, 376 U.S. 930, 84 S.Ct. 699, 11 L.Ed.2d 650 (1964).

[6,7] Thompson also claims that his consent was not voluntarily given because he was in a "custodial type environment." It is settled that a person in custody may voluntarily consent to a search. **United States v. Watson**, 423 U.S. 411, 424-25, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); **United States v. Lemon**, 550 F.2d 467, at 471 (9th Cir. 1977); **United States v. Tolias**, 548 F.2d 277, at 278 (9th Cir. 1977). We find no evidence of duress or coercion in the "totality of all the

circumstances" in the record before us. **Schneckloth v. Bustamonte**, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[8] Finally, the argument presented by Reeve, Harris, and Thompson that the trial court committed reversible error in postponing the hearinglon their motions to suppress is also without merit. They made no objection below to the trial court's adopting this procedure, and, while it is preferable that such motions be decided before trial, **see United States v. Mauro**, 507 F.2d 802, 806 (2d Cir. 1974), **cert. denied**, 420 U.S. 991, 95 S.Ct. 1426, 43 L.Ed.2d 672 (1975); **United States v. Whitted**, 454 F.2d 642, 644 (8th Cir. 1972); **Solomon v. United States**, 133 U.S.App.D.C. 103, 408 F.2d 1306, 1309 (1969); **United States v. Dooling**, 406 F.2d 192, 196 (2d Cir.), **cert. denied sub nom. Persico v. United States**, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969), that procedure is not mandatory. A trial court may, in its discretion, defer a hearing on a motion to suppress made before trial for determination at trial or after the verdict as long as no "party's right to appeal is adversely affected," Fed.R.Crim.P. 12(e). **See United States v. Kir**, 528 F.2d 1057, 1064 (5th Cir. 1976). **But see United States v. Smith**, 527 F.2d 692, 693 (10th Cir. 1975). Obviously, appellants' rights to appeal were not "adversely affected" by the trial court's decision to postpone the hearing, and we can discern no other prejudice to them that could possibly render the trial court's decision "plain error" under Rule 52(b). See

United States v. Jeffery, 473 F.2d 268, 270-71 (9th Cir.), **cert. denied**, 414 U.S. 818, 94 S.Ct. 42, 38 L.Ed.2d 51 (1973); **Herzog v. United States**, 235 F.2d 664, 666-67 (9th Cir.) (en banc), **cert. denied**, 352 U.S. 844, 77 S.Ct. 54, 1 L.Ed.2d 59 (1956). (See Footnote 2.) **AFFIRMED.**

2. Appellants filed their motions to suppress on December 29, 1975, and trial commenced on February 3, 1976. Thus, the revisions to Rule 12, Fed.R.Crim.P., which took effect on December 1, 1975 were applicable.

Former Rule 12(b)(4) dealt with the timing of hearings on pretrial motions to suppress:

> A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. . .

This Rule had been interpreted as allowing the trial court, in its discretion, to postpone the hearing until trial or after the jury had returned its verdict. *See United States v. Covington*, 395 U.S. 57, 60, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969); *United States v. Collins*, 491 F.2d 1050, 1052 (5th Cir.), *cert. denied*, 419 U.S. 857, 95 S.Ct. 104, 42 L.Ed.2d 90 (1974); *Dooling, supra*, at 197. This matter is now covered in revised Rule 12(e):

> A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. . . .

The Advisory Committee Notes to Rule 12(e) and its legislative history, *see* H.R.Rep.No.94-247, 94th Cong., 1st Sess. 7-8, *reprinted in* U.S.Code Cong. & Ad.News 679-80 (1975), confirm that, while retaining the rule that the decision to postpone the hearing on a pretrial suppression motion lies in the sound discretion of the district court, the amendments to Rule 12 were intended to encourage pretrial determination of such motions. But those sources also explain that the principal reason for preferring that procedure is to preserve the *Government's* right, under 18 U.S.C. § 3731, to appeal an adverse ruling. *See* 8 J. Moore, Moore's Federal Practice ¶ 12.04, at 12-24 (2d ed. 1976). *See also Mauro, supra* at 806.

APPENDIX "B"

"COPY"

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Roy David THOMPSON, aka, Larry Gene Madden, Defendant-Appellant.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Michael George REEVE and Albert David Law, Jr.,
Defendants-Appellants.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Derek Trevenning HARRIS,
Defendant-Appellant.
Nos. 76-1821, 76-2041 and 76-2605.

ORDER

Before CHAMBERS and CHOY, Circuit Judges, and PECKHAM,* District Judge.

The Panel as constituted in the above case has voted to deny the Petition for Rehearing and to reject the Suggestion for Rehearing en banc.

The full court has been advised of the Suggestion for Rehearing en banc and no Judge of the Court has voted to grant Rehearing en banc. F.R. App. P. 35(b).

The Petition for Rehearing is denied and the Suggestion for Rehearing en banc is rejected.

F-I-L-E-D
August 25, 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

*Honorable Robert F. Peckham, United States District Judge, for the Northern District of California, sitting by designation.

PROOF OF SERVICE

State of California)
ss
County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action; My business address is 1509 N. Main, Santa Ana, California 92701.

I served the within

PETITION FOR WRIT OF CERTIORARI
on the
interested parties in said action, by placing a true copy in each of three sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

U. S. Solicitor General
Department of Justice
Washington, D.C. 20530

U. S. Attorney
District of Nevada
300 Las Vegas Blvd. South
U. S. Court House
Las Vegas, Nevada

Federal Public Defender
U. S. Court House
312 North Spring
Los Angeles, California
Att'n Carole Koontz, Esq.

I CERTIFY under penalty of perjury that the foregoin is true and correct. Executed on 23 September 1977 at Santa Ana, California.

JACK GALLAGHER